In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1363

CITY OF CHICAGO, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

No. 1364

CITY OF CHICAGO, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

These are direct appeals from two final orders of a three-judge district court which, after a joint hearing, dismissed for lack of jurisdiction suits brought by appellants to review determinations of the Interstate Commerce Commission allowing the discontinuance of

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certain trains.[1] The United States and the Interstate Commerce Commission believe that this Court has jurisdiction of these appeals and that the judgments below should be reversed and the causes remanded for review of the Commission's determinations on the merits.

In *Chicago & Eastern Illinois Railroad Co.—Discontinuance of Trains, etc.*, 331 I.C.C. 447 (J.S., No. 1363, 8a-35a), the Commission found that the continued operation of Chicago & Eastern Illinois Railroad Company's passenger trains Nos. 93 and 54 between Chicago and Evansville, Indiana, was not required by public convenience and necessity and that continued operation thereof would unduly burden interstate commerce. In *Louisville and Nashville Railroad Company—Discontinuance of Trains, etc.*, 333 I.C.C. 720 (J.S., No. 1364, 3a-24a), the Commission made the same findings with respect to passenger trains Nos. 6 and 7 operated by the Louisville and Nashville Railroad Company between New Orleans and Cincinnati.

Each decision by the Commission followed a hearing in which the appellants participated, and in each case the Commission's decision took the form of an order terminating the investigation of the proposed discontinuance that the Commission had instituted pursuant to Section 13a(1) of the Interstate Commerce Act (49 U.S.C. 13a(1)). Both appeals raise the identi-

[1] The opinion in No. 1363, *City of Chicago* v. *United States*, is reported at 294 F. Supp. 1103 (J.S., No. 1363, 3a–7a). The opinion in No. 1364, *Tennessee Public Service Commission* v. *United States*, is reported at 294 F. Supp. 1106 (J.S., No. 1364, 1a–2a).

cal question whether such an order by the Commission under Section 13a(1), which in effect authorizes a train discontinuance on the basis of findings made after hearing, is a reviewable order within the meaning of 28 U.S.C. 1336(a).[2]

Section 13a(1)[3] permits a railroad to discontinue the operation of an interstate train upon the posting and filing of notice at least 30 days in advance of the proposed discontinuance. During the 30 day period the Commission may institute an investigation of the proposed discontinuance and may require the railroad to continue the operation of the train, "pending hearing and decision in such investigation," for not longer than four months after the proposed discontinuance would have become effective. "If, after hearing in such investigation * * * the Commission finds that the operation of or service of such train * * * is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require [its] continuance * * *" (or restoration, if the four month period has expired) for not more than one year. If the Commission does not require continuance, either with or without such an investigation, the train may be discontinued without regard to any state requirement.

The district courts are divided as to the reviewability of such orders allowing train discontinuances

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[2] 28 U.S.C. 1336(a) provides:

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

[3] Set forth in full at J.S., No. 1363, 1a–2a.

following Commission investigations.[4] *State of Minnesota* v. *United States*, 238 F. Supp. 107 (D. Minn.), and *State of New Hampshire* v. *Boston and Maine Corporation*, 251 F. Supp. 421 (D.N.H.), held—like the decisions below—that Commission orders terminating Section 13a(1) investigations after hearing are not "orders" within the meaning of the judicial review statute. These decisions are directly contrary to subsequent decisions of three-judge district courts in *State of Vermont* v. *Boston and Maine Corp.*, 269 F. Supp. 80 (D. Vt.); *City of Williamsport* v. *United States*, 273 F. Supp. 899 (M.D. Pa.);[5] and *State of New York* v. *United States*, N.D.N.Y. No. 67–CV–207, appeal pending, No. 1362, O.T., 1968. And, after the decisions in the instant cases were rendered by the court below, a different panel of three judges in the Northern District of Illinois (Swygert, C. J., Hoffman, and Marovitz, D.JJ.) denied a similar motion to dismiss a suit to review a Commission order of the same kind (*City of Chicago* v. *United States*, N.D. Ill. No. 68 C 2184), thus creating a conflict within the Northern District of Illinois.

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[4] It is settled that a decision of the Commission not to enter into an investigation of a proposed discontinuance is not reviewable, since that decision is committed to the exclusive discretion of the Commission. *State of New Jersey* v. *United States*, 168 F. Supp. 324 (D.N.J.), affirmed *per curiam*, 359 U.S. 27; *Sludden* v. *United States*, 211 F. Supp. 150 (M.D. Pa.); see *Williamsport*, *supra*, 273 F. Supp. at 902, note 5.

[5] The decision in *Williamsport* was interlocutory. Subsequently the court sustained the Commission's order on the merits. 282 F. Supp. 46, affirmed *per curiam*, 392 U.S. 642.

We submit that the reasoning and result of the decisions holding in favor of review are clearly correct, and that the decisions of the court below are in error.

The theory that the district courts lack jurisdiction to review a Commission determination that continuance of train service is not required rests largely on the premise that the statute is "self-implementing" in such a case. See the opinion below in *City of Chicago* v. *United States,* J.S., No. 1363, 5a–7a; *New Hampshire, supra,* 251 F. Supp. at 423–424; *Minnesota, supra,* 238 F. Supp. at 111–112. These cases rely on the fact that the statutory scheme puts the Commission in the position of ordering its investigation terminated—if its findings are that the train is not required—rather than granting any specific authority to the railroad. The railroad derives its authority to discontinue the train, it is said, from the statute itself, and the Commission has done nothing more than decide not to exercise its veto power, as it might have—unreviewably—in failing to initiate the investigation. These cases recognize, however, the railroads' right to judicial review if the Commission orders continuance of the train, because then an affirmative order rather than "non-action" by the Commission is involved. See the opinion below in *City of Chicago* v. *United States,* J.S., No. 1363, 6a; *New Hampshire, supra,* 251 F. Supp. at 425.

Such conceptual reasoning ignores the realities of the situation: Once the Commission has exercised its discretion to conduct an investigation into the merits of the questions whether continuance of a train is re-

quired by the public convenience and necessity and whether it would unduly burden interstate commerce, there is no discretion to decide those questions otherwise than in accordance with law. There is a vital distinction between a decision not to entertain a case and a decision of that case on the merits. Once the Commission decides to rule upon the merits—as it did in these cases—the result obviously turns on which way the Commission resolves the merits, and the fact that the decision is in form one whether or not to let the statute "implement itself" is immaterial. There is no reason to say that an affirmative answer to the statutory questions is an "order" but a negative answer is something else. Either answer is a decision of the case that the Commission has undertaken to hear, and both are equally subject to judicial review.

The reasoning below—and in the other cases that have reached the same result—bears a remarkable resemblance to those early cases, since overruled, which held that courts could review only "affirmative" orders of an agency and could not review "negative" orders. See, *e.g., Lehigh Valley Railroad Company* v. *United States,* 243 U.S. 412; *Proctor & Gamble Company* v. *United States,* 225 U.S. 282. The negative order doctrine was firmly repudiated in *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125. In language that is equally applicable to the instant cases, Mr. Justice Frankfurter stated for the Court (307 U.S. at 142–143):

> An order of the Commission dismissing a complaint on the merits and maintaining the *status*

> *quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. * * * We conclude, therefore, that any distinction, as such, between "negative" and "affirmative" orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding.

Additionally, there is a clear analogy between Section 13a(1) and Section 15(7) of the Act (49 U.S.C. § 15(7)). Under Section 15(7) a Commission decision as to whether to suspend a new rate cannot be judicially reviewed, *Luckenbach Steamship Company* v. *United States,* 179 F. Supp. 605 (D. Del.), modified on other grounds, 364 U.S. 280, just as a decision not to investigate a proposed train discontinuance cannot be reviewed.[6] On the other hand, it is well established that after consideration of the merits by the Commission, its final decision not to set aside a new rate is reviewable. *E.g., Interstate Commerce Commission* v. *Inland Waterways Corp.,* 319 U.S. 671.[7]

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[6] See note 4, *supra.*

[7] The court in *New Hampshire, supra,* erroneously reasoned that Section 13a(1) requires only an "investigation" whereas Section 15(7) requires a "hearing" (251 F. Supp. at 424). However, Section 13a(1) expressly provides that the Commission may require continuance or restore service only "after hearing in such investigation," and thus the two statutory schemes are substantially the same.

There is nothing in Section 13a(1) or its legislative history indicating that Congress intended to deny aggrieved members of the public the right to judicial review where the Commission finds, after a hearing, that continuance of train service is not required.[8] This Court has recently made plain that a Congressional purpose to limit the right to judicial review of final agency action will not be presumed in the absence of clear and convincing evidence of an intention to do so. *Abbott Laboratories* v. *Gardner,* 387 U.S. 136. The Court stated that:

> a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. * * * [T]he Administrative Procedure Act * * * embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. § 701(a). [387 U.S. at 140.]

Finally, there are strong reasons of policy favoring the right to review Commission decisions, after hearing, which refuse to order the continuance of train

[8] While the Commission has recommended legislation removing any doubt as to the reviewability of orders entered after hearings refusing to continue train service, it has also advised Congress that it reads the existing statute as permitting **judicial review of such orders on complaint of an aggrieved** party. Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce on S. 1175, 90th Cong., 1st Sess., pp. 11–12, 21–24.

service. The decisions below would permit railroads to obtain review of a decision requiring continuance, but would deny that right to parties aggrieved by a contrary decision—no matter how erroneous the Commission's findings might be. This would be manifestly unfair. Cf. *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576. Since Congress has not expressly precluded judicial review of Commission decisions based on findings made after investigation and hearing that continuance of train service is not required, there is no reason for the courts to extinguish that right.

For the foregoing reasons, we agree with the appellants that the decisions of the district court in these cases should be reversed. Accordingly, we urge that probable jurisdiction be noted; alternatively, the Court may deem the cases appropriate for summary reversal.

Respectfully submitted.

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